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Supreme Court U.S.
FILED
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NO. 03-610

IN THE
SUPREME COURT OF THE UNITED STATES.

BABASHOLA (SHOLA) ABE / PETITIONER, PRO SE

v

MICHIGAN STATE UNIVERSITY / RESPONDENT.

Babashola (Shola) Abe -
Petitioner
3111-2C Trappers Cove Trail,
Lansing, Michigan 48910
(517) 394-1605

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---/

PETITIONER'S PETITION TO REHEAR.

Babashola (Shola) Abe, PRO SE
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MICHIGAN COURT RULE:

MCR 7.215 (I) (1).

> " A panel of the Court of Appeals MUST follow the rule of law established by prior published desicions of the Court of Appeals issued on or after November 1, 1990 that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule."

See all the Michigan cases cited above.

PETITION TO REHEAR.

PETITION TO REHEAR, TO DETERMINE THE **MERIT** OF PETITIONER'S DEMAND AND CLAIM OF RIGHT TO JURY TRIAL, AS INTENDED IN **THE STATE'S ELLIOTT LARSEN CIVIL RIGHTS ACT OF 1976,** IN STATE'S CONSTITUTION, ARTICLE 1, SECTION 14 - PRESERVATION OF LITIGANTS RIGHT TO JURY TRIAL - ON DEMAND, AND THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION, AND AS DEMANDED BY PLAINTIFF/PETITIONER WITH HIS COMPLAINT & AMENDMENTS ON JANUARY 11, 1996, CASE NO 96-82140-NZ, AS DEMANDED BEFORE THE MICHIGAN COURT OF APPEALS IN BRIEF DATED 11/9 2000, FILED 11/13/2000, COA # 230819, PAGE 45, ITEM # 4, PAGE 46, IN BRIEF BEFORE THE COURT DATED AND FILED JUNE 14, 2002, COA # 241968, PAGE 4 & 5, BRIEF IN SUPPORT, PAGE 50, # 4, PAGE 36 & 51, IN LIGHT OF THE COURT'S INCORRECT STATEMENT OF NO MERIT AND UNTIMELINESS TO SUCH CLAIMS IN ITS ORDER OF JULY 29, 2002, COA# 241968, INCORPORATING ITS ORDER OF MAY 3, 2001 BY REFERENCE. TRIAL COURT ARBITRARILY DENIED JURY TRIAL WITHOUT EXPLANATION. REMAND, TO DETERMINE THE **MERIT** OF ISSUES IN CONTROVERSY IN THIS CASE ARGUED IN PETITION, AS PREVIOUSLY BEFORE THE COURT OF APPEALS. REQUEST FOR A RESPONSE FROM RESPONDENT. DIRECTLY ADDRESS THE APPLICATION OF THE CONSTITUTIONAL EQUAL PROTECTION CLAUSE TO THIS CASE.

INTRODUCTION.

After the review of the argument in support of this petition, it is respectfully, reasonably expected and desirable,

that The Honorable Court would reach the following conclusions. That It would grant rehearing. Request the respondent to respond to petition. If there is no response, then the content of petition should be taken to be completely true and correct. If there is a response, but omit issues in petition unanswered, then such issue(s) should be taken as completely true and correct. This would aid in finding justice in this case. That the July 29, 2002 Order of the Michigan Court of Appeals, which incorporates its May 3, 2001 order by reference, should be vacated, remand to state court, to determine the **MERIT** of whether plaintiff / petitioner had and has right to jury trial as demanded by petitioner, as legislatively intended by The Elliott Larsen Civil Rights Act involved in this case, and as preserved by both Federal and State constitutions, since the trial court intentionally, arbitrarily denied petitioner that right to jury trial without explanation. Also, that The Court would direct the State Court to fully determine the **MERIT** of the issues of law in controversy in the circuit court's judgment, as argued below, and as previously before The Court of Appeals. That The Court would directly address the application of the Equal Protection Clause as concerned in this case.

ARGUMENT

1. In a case very similar to the petitioner's case, involving the same counsel, and the same defendant, as in petitioner's case , *Anzaldua v Band and Michigan State University*, 216 Mich. App.561, 550 N.W. 2d, 544 (1996); MCR 7.2215 (I)(1); ***Anzaldua v Band & Michigan State University*, 578 NW 2d 306,(Mich. 1998);** 457 Mich. 530; 456 Mich. 864, 568 N.W. 2d 683, 684 (1997), The Michigan Supreme Court, Justice Marilyn Kelly, joined by four other justices, upheld the Michigan Court of Appeals decision to reverse a circuit court's judgment that denied plaintiff jury

trial. The Michigan Supreme Court reasoned as follows,

> **"Because the right to jury trial exists as a matter of legislative intent under the Whisleblowers' Protection Act, it is unnecessary for us to reach the question whether such a right is preserved by the Michigan Constitution."**

Plaintiff / Petitioner, brought a discrimination action against defendant / respondent under the Elliott Larsen Civil Rights Act cited in this case, seeking declaratory relief and money damages - a law issue, triable by jury, with a demand for, and entitlement to jury trial like the plaintiff, Anzaldua, in *Anzaldua v Band & Michigan State University* cited above. The State denied plaintiff / petitioner jury trial without explanation. ***The Elliott Larsen Civil Rights Act,*** Public Acts 1976, No 453, Article 8, sections 37.2801, 2802, & 2803, provides for remedies for violation of this Act. Section 37.2801 (MCL 37.2801), provides for injunctive relief; damages; or both, and the right to jury trial as petitioner demanded. " A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both." And this right exists as a legislative intent, in suits against the state and its subdivisions. See *Anzaldua v Band* cited above. See, ***Lorillard v Pons,* 434 US 575, 98 S. Ct. 866, 55 L Ed 2d 40 (1978)**. A ruling in which The Court found statutory right to jury trial in the Age Discrimination in Employment Act (ADEA), 29 USC 624 et seq. Also see, *Smith v University of Detroit,* 145 Mich. App. 468, 378 NW 2d 511 (1985). COA # 241968, brief, pg.36. Decision reversed and remanded. <u>The reasoning in these cases, and Anzaldua v Band v Michigan State University cited above, are persuasive, and apply to The Elliott Larsen Civil Rights Act of the State of Michigan, Public Acts of 1976 involved in petitioner's case.</u> These cases, the provisions of The Elliott Larsen Civil Rights Act, plus, petitioner's jury trial rights,

preserved both by State and Federal constitutions, **shows that petitioner's claim of right to jury trial was/is timely and of legal merit,** contrary to the holding of the Michigan Court of Appeals, in its order of July 29, 2002, incorporating its order of May 3, 2001 by reference. The State's Circuit Court arbitrarily denied Petitioner **jury trial as demanded with his complaint** because of petitioner's race and national origin. "Plaintiff demands trial by jury of all jury triable issues."; The State of Michigan Constitution, Article 1, section 14. "The right to jury trial shall remain when demanded by one of the parties". Also see: U. S. Const. Amend. 7." The state's circuit court, and subsequently, the state Court of Appeals, incorrectly arbitrarily denied plaintiff / petitioner jury trial as demanded, and as entitled to, **even though, the right to jury trial exists as a matter of legislative intent under *The Elliott Larsen Civil Rights Act*** cited above, against the State of Michigan and its subdivisions, and equally important, as constitutionally preserved as cited above. State Courts decisions denying petitioner's jury trial rights under the above mentioned legal provisions as in this case, violated and violates the constitutional equal protection of the laws clause. Const. Amend. 14. Such decision should not be allowed to stand. See, *Shelley v Kraemer,* 68 S. Ct. 836, 334 U. S. 1, 92 L Ed, 1161, 3 A.L.R. 2d 441; *Phillip v Naff*, 52 N.W. 2d 158, 332 Mich. 389.

2(a). Petitioner's complaint was based on race and national origin discrimination. By its very nature, a racially discriminatory purpose for challenged act is unlikely to be expressed on the record, discriminatory intent, if it exists, necessarily must be inferred by court from totality of evidence, whether direct, indirect, or circumstantial. U.S.C.A. Constitutional Amendment 14. *Beasly v. Potter,* 493 F. Supp. 1059. In Respondent's discriminations against

petitioner, it violated petitioner's civil rights under The State of Michigan Civil Rights Statute, The *Elliot Larsen Civil Rights Acts of 1976, as amended by Act 11, Public Acts of 1991,* Article 4, section 401; section 402 (1)(a)(b); *The State of Michigan Gross Negligence Statute - Wilful & Intentional conduct,* MCLA 691.1401-1407; *The Federal Civil Rights Statute, Title VI of the Federal Civil Rights Act of 1964, and its implementing regulations,* 45 CFR, part 80, (section 6602 of Title VI, 78 stat. 252; 42 U.S.C. 2000d.1).

Respondent pled no contest to petitioner's allegations of discrimination, nor contest petitioner's demand & entitlement to jury trial, and not immune from jury trial under the Elliott Larsen Civil Rights Act. Respondent later in the proceedings ADMITTED under oath to having intentionally violated the provisions of the above statutes. See Petitioner's Exhibit 38, item # 2, in court's record. Also, # 12,14,18,22,29,38,62,80.

Question: "Do you admit that Michigan State University-College of Osteopathic Medicine hereby to henceforth known as MSU-COM had **a wilful intention** not to retain, educate, and/or graduate Babashola Abe (Shola Abe) as a student as MSU-COM."

Answer: "Defendant **admits the assertion in part.** As of approximately January 1993, **the assertion is admitted.**" See, *Hullett v Smiedendort,* W.D. Mich. 1999, 52 F. Supp. 2d 817. *Glicker v Michigan Liquor Control Commission,* 160 F. 2d 96. Respondent's discriminations against petitioner were wilful, and intentional as admitted to, with the knowledge of its conducts and the adverse effects of those conducts, with the ability to avoid injury to petitioner, but wilfully and intentionally ignored and disregarded its knowledge, with an indifference as to whether harm came to petitioner or not. Respondent's admitted discriminatory conducts was not and is not a high degree of carelessness as ruled by The Michigan Supreme Court in *Jennings v Southwood,* 446 Mich. 125,

NW2d 230, (1994); *Burnett v City of Adrian (1982)*, 326 NW2d 810, 414 Mich. 448; MCR 2.116 (G)(3). *Also see Transcript of Oral Argument, as submitted to the Michigan Court of Appeals*, pg. 3, lines 21-25, pg.4, lines 1-3. Respondent's intentional discriminatory violations against petitioner as admitted to above, had no, and has no justifiable, or legitimate non discriminatory reason. Its discrimination against petitioner was arbitrary. It had no evidence of its claims. It submitted no evidence of its claims on which judgment was based. It did not, and can not produce the evidence to support its claim(s). Respondent's discrimination against petitioner was materially adverse to petitioner. See *Wilcoxon v Minn. Mining & Mfg Co.*, 235 Mich. App. 347; NW 2d 250 1999. Respondent's violation of the above statutes, as admitted to, is a violation of the Equal Protection of the laws. Const. Amend. 14. Respondent is responsible for the consequences of its intentional conducts whether it could or could not have foreseen them. See, *Van keulen v Winchester Lumber Co., Manistee and NER Co.*, 222 Mich. 682, 687, 193 NW 289 (1923); *Anton v Emergency Medical Services Inc.*, 190 Mich. App. 5992, 476 NW 2d 479 (1991).

(b). The Circuit court intentionally arbitrarily failed to dismiss against respondent as moved by petitioner on May 25, 2000, because of respondent's failure to respond to request to admit, produce, answer interrogatories, nor objected to request within the time frame given to do so by court rules. *MCR. 2.312 (B)(1)*. The court's conduct was an abuse of discretion, just to discriminate against petitioner. See *Medbury v Walsh, 190 Mich. App.* 554, 476 NW 2d 470 (1991); MCR 7.215 (I)(1). This case law and court rule, says that the case should have been dismissed against respondent on May 25, 2000, because of the above.

(c). The Circuit Court had no evidence of Respondent's

claim on which judgment was based. There was no and there is no fact or evidence on record to support the circuit court's claim in its opinion regarding respondent's claim(s). That is beside the fact that petitioner denied and denies respondent's claim with relevant documentary evidence. See Michigan COA # 241968, brief, pg. 21-24. The Court asked Respondent's counsel during oral argument,
"THE COURT: Mr. Kiley, how do you get 42 percent? Why are you double counting the classes he's remediated ..."
Counsel had no relevant answer to the court's question, neither did he provide nor submitted any relevant evidence to support its claim as reported in paragraph five of the trial court's opinion, under analysis. That was why it demanded, and in an abuse of discretion, got a discretionary judgment from the court. See section of opinion cited above. See, *Transcript of oral argument in The Michigan Court of Appeals record,* pg. 18, line 25, pg. 19, lines 1-3.
Michigan Supreme Court Case law says that the lower court's judgment should be reversed accordingly. See *Lazarus v City of Detroit,* 437 Mich. 920, 466 NW 2d 284 (1991).
Respondent presentation to the court were only conjectures, in its attempt to defend its indefensible position. The circuit court intentionally, in an abuse of discretion awarded judgment to respondent even though it knew that conjectures can not be used to defeat a motion for summary disposition, as ruled by Michigan Court of Appeals in, *South Macomb Disposal Authority v American Ins. Co.,* 1997, 225 Mich. App. 635, 572 NW 2d 686; MCR 7.215 (I)(1). Again, this case law and court rule mandates judgment in this case to be reversed in favor of petitioner.
(d). Petitioner's pleadings and UNCONTROVERTED admissible documentary evidence before the court, that refuted and nullified respondent's claims, **established** that petitioner was entitled to judgment as a matter of law,

contrary to the trial court's statement in paragraph eight of its opinion, under analysis. See Petitioner's Exhibit 37 and others in the court's record. *Kennedy v Auto Club.* 215 Mich. App. 264, 544 NW2d 750 (1996); MCR 7.215 (I)(1). The state court intentionally, arbitrarily ignored the relevant evidence before it in an abuse of discretion. See *Meyer v City of Centerline,* 242, Mich. App. 560, 568, 619, NW2d (2000); MCR 7.215 (I)(1). These case laws and court rule mandated and mandates a reversal of judgment in favor of petitioner.

(e). Respondent never set forth any genuine issue of material fact regarding its claim as required by MCR 2.116 (G)(4), Rule 56 (C) of the Federal Rule of Civil Procedure, because it had no and has no genuine issue of material fact. The rule of laws mandated and mandates that petitioner is entitled to judgment as a matter of law, and judgment in this case should be reversed in favor of petitioner accordingly. See *McCart v J. Walter Thomson, Inc.,* 437 Mich. 109, 469, NW2d 284, 1991; *Norris v State Farm Fire & Cas. Co.,* 239 Mich. App. 231, 581 NW2d 746 (1998); *Quinto v. Cross & Peters Co.,* 451 Mich. 358, 362; 547 NW2d 314 (1996); *Dafter Sanitary Landfill v Michigan Dept. Of Natural Resources (1993),* 198 Mich. App. 499, NW 2d 383; MCR 7.215 (I)(1).

(f). Respondent did not and can not successfully rebut the legal presumptions above. Its failure to rebut presumptions mandates judgment for petitioner. See *Isabella County Dept. Of Social Services v Thompson,* 1995, 210 Mich. App. 612, 534, NW 2d 132; MCR 7.215 (I)(1).

(g). The Circuit court's final decision is appealable as a matter of statutory right. MCR 7.204; MCR 7.203 (A)(1); MCLA 600.308 (1)(a); MSA 27A.308[1][a].

"The Court of appeals has jurisdiction on appeals from such judgment or order. On may 18, 2001, 7 months, less than 12 months after the circuit court's final judgment, also on June

14, 2002, Petitioner filed the jurisdiction statement of Appeals of Right with The Court of Appeals. Petitioner was timely in claiming and asserting his statutory right above. See, record, Michigan COA #230819, # 241968, page 6, items 1-4.

(h). Respondent has not at any time in the process of this case responded to Petitioner's legal issues before the court in conforming ways to court rules. MCR 7.212 (C(5) & (6). His presentation in response to petitioner is usually, self serving, devoid of relevant citation or reference to the record. This issue was raised before the Michigan Supreme Court by petitioner on March 18, 2003, with a request to strike respondent's brief for such lack of conformity to the rules. File No. 122406, Brief, page 22, item # 5. See *Isagholian v Transamerica , Ins. Corp., 208,* Mich. App.9, 527 NW2d 13, (1994); *Cvengros v Farm Bureau Inc.,* 216 Mich. App. 261, 548 NW 2d 698 (1996); *Continental Paper and Supply Co., v City of Detroit,* 205 Mich. App. 404, 521 NW 2d 844 (1994); *appeal granted,* 448 Mich. 930, 534 NW 2d 519 (1995), *rev'd, remanded on other grounds,* 451 Mich. 162, 542 NW 2d 657 (1996). Petitioner respectfully asks the Honorable Court to request that respondent, respond to this petition for rehearing, addressing each and all the issues raised in this brief. Equality under the law requires that respondent and petitioner be treated equally under the law.

3. The above legal issues in this case are what The Michigan Court of Appeals incorrectly determined to be of no merit. Respondent did not and can not contradict or impeach the merit of the above issues of law and argument. Therefore, the decision of The Appeals Court, and the circuit court decision within its scope, should not be allowed to stand. Because such decisions incorrectly suggests, that petitioner is not entitled to the constitutional rights and the equal protection of the laws like other citizens. Const. Amend. 14.

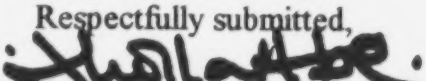
See, *State of Missouri v Lewis,* 101 U.S. 22, 11 Otto, 22, 25 L.Ed. 989. *Anzaldua v Band v Michigan State University* cited above.

Respectfully, it is the obligation of this Honorable Court, as the last supervisory court, to direct and order The State Court to review and fully determine the **merit** of the issues of law in this case. Without such, petitioner's statutory, constitutional, and fundamental rights, with finality, would be irreparably damaged or lost, and justice undone. See, *Shelley v Kraemer,* 68 S. Ct. 836, (at 11), 334 U.S. 1, 92 L. Ed. 1161, A.L.R. 2d 441; *Phillip v Naff.,* 52 NW 2d 158, 332 Mich. 389, (at 6).

CONCLUSION

Respectfully, The Court should grant rehearing, request for a response from respondent, then vacate the State Court's order of July 29, 2002, along with its order of May 3, 2001 incorporated by reference. Remand to state court to determine the MERIT of whether petitioner had and has right to jury trial in this case under The Elliott Larsen Civil Rights Act of 1976, since the trial court arbitrarily denied petitioner his right to jury trial claimed under this act without explanation. Also that The Court would direct The State Court to fully determine the MERIT of issues of law in controversy in the trial court's judgment as argued above, and as previously before The State Court of Appeals. Directly address the application of the Equal Protection Clause to this case, to aid the purpose of justice and fairness.

Respectfully submitted,



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December 26, 2003.

NO. 03 - 610

IN THE
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BABASHOLA (SHOLA) ABE - PETITIONER
VS
MICHIGAN STATE UNIVERSITY - RESPONDENT

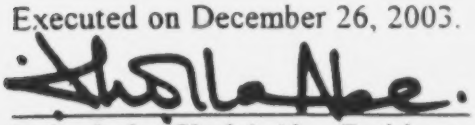
PROOF OF SERVICE.

I Babashola Abe, do swear and declare that on this date, December 26, 2003, as required by the Supreme Court Rule 29.5, 28 U. S. C. Sec. 1746, I have served three copies of the enclosed petition on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing three copies of the above document in the United States mail properly addressed to the counsel of record and with first-class postage prepaid.

The name and address of the person served is as follows: Mr. Michael J. Kiley (26387), Attorney for Respondent, Office of the General Counsel,
Michigan State University, 494 Administration Building, East Lansing, Michigan 48824-1046.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 26, 2003.



Babashola (Shola) Abe, Petitioner.

CERTIFICATE OF PETITIONER.

I Babashola (Shola) Abe, petitioner, do hereby certify that this petition for rehearing is presented in good faith and not for delay. That it is restricted to substantial grounds not previously presented. Also, the contents of this petition are true and correct.

Dated: December 26, 2003.

Babashola (Shola) Abe
Petitioner.